

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 160

Docket No. SF-831M-10-0302-I-1

**Cesar R. Ramirez,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

August 2, 2010

Elaine W. Wallace, Esquire, Oakland, California, for the appellant.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of a March 2, 2010 initial decision. The initial decision dismissed for lack of jurisdiction his appeal of the Office of Personnel Management's (OPM's) October 20, 2009 decision recomputing his monthly annuity under the Civil Service Retirement System (CSRS) and finding that he had been overpaid \$7,988.13 in benefits. Initial Decision (ID) at 1. For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d), REVERSE the initial decision, and

REMAND the appeal to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 In a previous August 19, 2009 initial decision, the administrative judge found that the appellant had filed a July 26, 2009 appeal concerning “the accuracy of [his] annuity computation,” that OPM had notified the appellant that it had erroneously paid him two interim payments, and that, “[o]n April 3, 2009, the appellant requested waiver and reconsideration of the two overpayments.” *Ramirez v. Office of Personnel Management*, MSPB Docket No. SF-831M-09-0830-I-1 at 1, 3 (Initial Decision, Aug. 19, 2009). The administrative judge found, though, that OPM had not yet issued a final decision affecting the appellant’s rights or interests under the CSRS and that OPM had indicated that it was willing to issue a final decision once the Board appeal was no longer pending. *Id.* at 3. Therefore, the administrative judge granted OPM’s motion and dismissed the appeal for lack of jurisdiction. *Id.* at 4. The initial decision became the Board’s final decision on September 23, 2009, when neither party filed a petition for review.

¶3 On December 31, 2009, the appellant filed the present appeal, claiming that OPM had begun to deduct the alleged overpayment from his monthly annuity without issuing him a decision on his request that it reconsider whether he had been overpaid, and, if so, that it waive collection of the overpayment. Initial Appeal File (IAF), Tab 1 at 5-8. The administrative judge issued an Acknowledgment Order and show-cause orders to the parties, including an additional order to OPM to respond to the appeal. *Id.*, Tabs 2, 4, 10, 13. Both parties responded to the orders. *Id.*, Tabs 3, 6, 8, 12, 14. OPM again moved to dismiss the appeal for lack of jurisdiction. *Id.*, Tabs 6, 12.

¶4 In his March 2, 2010 initial decision, the administrative judge found as follows: On October 20, 2009, OPM issued an initial decision recomputing the

appellant's annuity, stating that the appellant had received a net overpayment of \$7,988.13, and stating that it intended to collect the overpayment in installments from future annuity payments. The Notice of Amount Due Because of Annuity Overpayment, RI 34-3, advised the appellant that he could request reconsideration. On October 29, 2009, the appellant requested reconsideration of the existence or amount of the overpayment* and requested waiver of collection of any overpayment. OPM apparently received, but failed to process, the request. In November 2009, OPM notified the appellant that it would commence collecting the overpayment on December 1, 2009. The appellant alleged that he made numerous inquiries to OPM regarding the overpayment and collection. On December 31, 2009, the appellant filed his appeal alleging that OPM had not issued a reconsideration decision and had begun collecting the alleged overpayment. ID at 3.

¶5 The administrative judge granted OPM's motion and dismissed the appeal for lack of jurisdiction. ID at 2, 4. He found that the Board generally lacks jurisdiction to hear an appeal of a retirement matter when OPM has not issued a reconsideration decision on the matter. *Id.* at 2. Citing *Johnson v. Office of Personnel Management*, [113 M.S.P.R. 118](#), ¶ 10 (2010), he acknowledged that the Board may take jurisdiction over a retirement appeal, even absent an OPM reconsideration decision, when the appellant has made "repeated requests" for such a decision and the evidence indicates that OPM does not intend to issue a final decision. ID at 2. He found, however, that in response to his February 12, 2010 order, OPM stated that it considered the appellant's October 29, 2009 request to be a timely request for reconsideration and that it would issue a final decision on the merits of the appellant's request. *Id.* at 3. He therefore found that OPM had not yet issued a final decision affecting the appellant's rights or

* The initial decision incorrectly uses the term "underpayment" in reference to the reconsideration request. ID at 3.

interests under the CSRS. He found it inappropriate for the Board to take jurisdiction because OPM had indicated that it intends to issue a final decision once the Board appeal is no longer pending. *Id.* at 4.

¶6 The appellant has filed a petition for review of the initial decision. Petition For Review (PFR) File, Tab 1. OPM has filed a response opposing the petition for review. *Id.*, Tab 4.

ANALYSIS

¶7 The Board generally lacks jurisdiction to hear an appeal of a retirement matter when OPM has not issued a reconsideration decision on the matter, and, accordingly, will dismiss the appeal. The Board has recognized an exception to that general rule, however, where OPM has failed to render a decision. Dismissal in such a case could effectively prevent an appellant from obtaining an adjudication of his claim. *Settlers v. Office of Personnel Management*, [108 M.S.P.R. 105](#), ¶ 9 (2008); *Sims v. Office of Personnel Management*, [94 M.S.P.R. 102](#), ¶ 10 (2003). The Board therefore will take jurisdiction, even absent an OPM reconsideration decision, when the appellant has repeatedly requested such a decision and the evidence indicates that OPM does not intend to issue a reconsideration decision. *Johnson*, [113 M.S.P.R. 118](#), ¶ 10; *see Settlers*, [108 M.S.P.R. 105](#), ¶ 9; *Sims*, [94 M.S.P.R. 102](#), ¶ 10. Because, as discussed below, OPM has in effect issued an appealable final decision concerning the existence and amount of the overpayment and the appellant's request for waiver, we find that the administrative judge erred in determining that the Board lacks jurisdiction over this appeal. *See, e.g., Johnson*, 113 M.S.P.R. 118, ¶ 10.

¶8 In his petition for review, the appellant reiterates, inter alia, that OPM is "garnishing" his benefits for the alleged overpayment. PFR File, Tab 1 at 9. In addition to the January 2010 Notice of Annuity Adjustment that he submitted below, IAF, Tab 1, att. 8, he has attached his February 2010 Notice of Annuity Adjustment, which indicates that OPM continues to deduct \$221.89 from his

monthly annuity checks to recoup the contested overpayment. PFR File, Tab 1 at 34-35; IAF, Tab 1, att. 8 (indicating that \$221.89 has been deducted under “Code 12” and that “Code 12” is “Collection of Annuity Overpayment”). OPM has not disputed the appellant’s assertion concerning its action. Indeed, OPM’s four-sentence response to the petition for review is simply a pro forma statement that the appellant’s petition for review does not meet the criteria for Board review. PFR File, Tab 4.

¶9 As described above, the appellant initially requested reconsideration on April 3, 2009, of the existence and amount of the alleged overpayment and waiver of any overpayment. He renewed that request on October 29, 2009. The appellant has filed two Board appeals, the administrative judge has issued two initial decisions, and OPM has still not provided the appellant with an appealable reconsideration decision on his request. OPM’s response to the appellant’s petition for review does not indicate that it has fulfilled, or intends to fulfill, its representation to the Board’s administrative judge that it will issue a reconsideration decision on the request. Indeed, OPM has not responded to the appellant’s assertion that, in essence, it has determined to ignore his reconsideration request by proceeding to collect the alleged overpayment in violation of its own procedures as set forth in its RI 34-3. That document states, in relevant part, that “[c]ollection actions will be suspended at all levels of review if a timely request [for reconsideration] is received.” IAF, Tab 1, att. 2 at 4.

¶10 Under these circumstances, we find that the exception to the general rule that the Board lacks jurisdiction absent an OPM reconsideration decision applies. Because OPM has failed to issue a reconsideration decision despite the appellant’s repeated requests and has commenced its collection of the alleged overpayment, its October 20, 2009 initial decision is tantamount to an appealable reconsideration decision that affects the appellant’s rights or interests under the CSRS. See [5 U.S.C. § 8347](#)(d)(1) (“an administrative action or order affecting

the rights or interests of an individual . . . under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board”); *Johnson*, [113 M.S.P.R. 118](#), ¶¶ 10-13; *Settlers*, [108 M.S.P.R. 105](#), ¶¶ 9-12; *Sims*, [94 M.S.P.R. 102](#), ¶ 11. Accordingly, we find that the Board has jurisdiction over this appeal.

ORDER

¶11 We REVERSE the administrative judge’s finding that the Board lacks jurisdiction and REMAND this case to the regional office for adjudication on the merits.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.